

In The
Supreme Court of the United States
October Term, 1990

THE LEXINGTON HERALD-LEADER COMPANY
and JOHN S. CARROLL,
Petitioners,
vs.

REGGIE WARFORD,
Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Kentucky

REPLY MEMORANDUM TO BRIEF IN OPPOSITION

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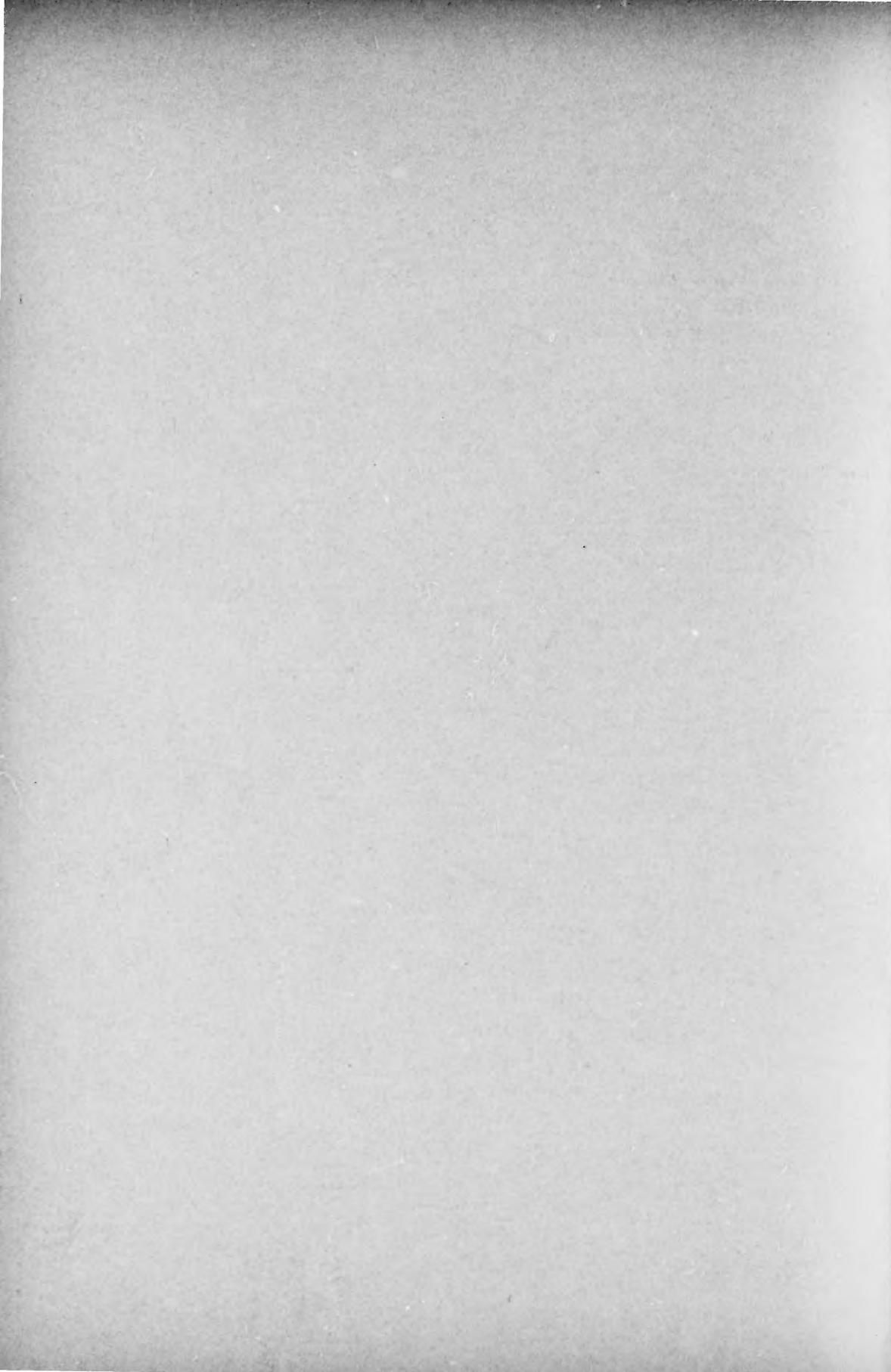


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REPLY MEMORANDUM TO BRIEF IN OPPOSITION

Petitioners The Lexington Herald-Leader Company and John S. Carroll offer the following points in reply to Respondent's Brief In Opposition to the Petition for a Writ of Certiorari to the Supreme Court of Kentucky.

1. Reply To Representations Concerning The Trial Transcript

Respondent states "the transcript cited throughout the Petition is not part of the Record on Appeal" and is not "available to Respondent." Respondent asserts that

neither this Court nor respondent can "review the cited material or verify its accuracy" because this was a "videotaped trial, with no official written transcript," and because the Kentucky Supreme Court denied permission "to supplement the Record on Appeal with a transcript made by Petitioners." (R. Br. at 2). Petitioners are surprised by the lack of candor shown here.

The transcript was made by a court reporter and submitted to the Kentucky Supreme Court by both the appellant (respondent here) Mr. Warford and the appellees (petitioners) in a Joint Motion to Supplement Record on Appeal. The Joint Motion is attached as part of the Supplemental Appendix hereto and is signed by respondent's counsel of record in this Court. It states in part:

The parties state that supplementation of the record on appeal with this transcript will benefit the Court and the parties by providing them the option of working with and citing to the transcript whenever possible, rather than having to exclusively use the video record. Since the transcript will be supplemental to the video record, the video will still be available to the parties and the Court for use in matters not included in the transcript. This appeal can be advanced more efficiently and economically through the use of the transcript and, therefore, the parties urge the Court to permit the record on appeal to be supplemented as requested.

(Supp. App. 1-2). While it is true the Supreme Court of Kentucky chose to rely only upon the video recording of the trial, this Court may choose otherwise if it accepts jurisdiction. Should jurisdiction be accepted, petitioners would move the Court to supplement the record with the transcript, and certainly provide a copy to respondent,

since he apparently was not permitted to retain one by counsel below.

Respondent's claim that he cannot verify the accuracy of any factual representation made in the Petition is meritless since the transcription is of a video recording respondent does have. Indeed, had respondent's counsel only informed counsel of record for petitioner that she needed a copy of the transcript, it would have been timely provided.

2. Reply To Jurisdictional Argument

Respondent argues that this Court lacks jurisdiction to review "the third question presented by Petitioners . . ." (R. Br. 2, 11-12). He is mistaken. The federal question was timely raised in Appellees' Petition for Rehearing. (Supp. App. 5-15). The federal question was raised by the following express argument:

D. The Ruling Impermissibly Burdens The Presentation Of Evidence On The Issue Of Truth

The Court in *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986) held, as a matter of First Amendment law, that "the common law's rule on falsity – that the defendant must bear the burden of proving truth – must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages." *Id.* at 776. It is Warford's burden to prove that the statements made about him were false. The effect of this Court's ruling precluding the admission of evidence of the use of recruiting

aides is to deprive the newspaper of the opportunity to present contrary evidence on the issue of the statement's alleged falsity. Such an effect is constitutionally impermissible.

(Supp. App. 15-16). This Court has repeatedly held there is jurisdiction over a federal question raised on rehearing in the state's highest court following, and necessitated by, the court's surprising departure from state law precedent. *Cole v. Arkansas*, 333 U.S. 196, 200 (1948); *Herndon v. Georgia*, 295 U.S. 441, 443-444 (1945); *Great Northern Ry. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 366-7 (1932). Respondent presents no argument that the ruling of the Supreme Court of Kentucky was not a surprising departure from prior state law, even though no other Kentucky case has held that the component elements of an illicit scheme or plan are inadmissible as "other acts." Petitioners' survey of Kentucky law in the Appellees' Petition for Rehearing demonstrates just how surprising a departure this was from both the decision of the trial court and all other relevant Kentucky precedents. (Supp. App. 6-14).

3. Reply To Respondent's Statement Of The Case

Respondent's Statement of the Case attempts to paint Warford as an obscure figure not worthy of public comment. (R. Br. 2-6). To this end, respondent twice notes there was no recruiting controversy at the University of Pittsburgh when Warford was hired. (R. Br. 4, 5 n.1). But this fact is not at all relevant to the issues. Warford was formerly the captain of the University of Kentucky basketball team. He returned to Lexington, Kentucky, to recruit Steve Miller, Kentucky's "Mr. Basketball," the

year's most celebrated Kentucky high school basketball player. He did this because his (Warford's) public reputation was strongest in Kentucky, so his recruiting was most efficacious there, and because he knew his national reputation as a recruiter would be greatly enhanced by recruiting "Mr. Basketball" from Kentucky. The absence of a specific recruiting controversy at Pittsburgh is irrelevant to the newsworthiness of the report, or to Warford's assumption of the risk of adverse public comment based on his activities in Kentucky.

Even more to the point, Pittsburgh hired Warford following the 1980 basketball season. The NCAA Reprint, the subject of Warford's libel suit, was published to its national NCAA audiences in January 1986, long after Pitt joined the Big East Conference following the 1981-82 season, and after Warford tried in 1983 to recruit Miller to play in that celebrated league. Clearly, whether there was a recruiting controversy at Pittsburgh six years earlier should not be dispositive of whether Warford should be deemed a "public figure" for purposes of the publication of the NCAA Reprint in 1986. In fact, the record is uncontradicted that there was a recruiting controversy at the University of Pittsburgh, revealed in large measure in the original *Herald-Leader* series, by the time the NCAA Reprint was published.

4. Reply To No Public Controversy Argument

Respondent argues the Supreme Court of Kentucky correctly held that the mere "general concern" about "college athletics" is not a "particular public controversy." (R. Br. 7-9). This argument is scarcely credible.

There can be no question that there has been a raging national public controversy regarding regulation of the recruiting of college athletes by universities acting under NCAA rules. The controversy may be fundamental, complex, and national in scope, but it is not "vague," nor may it be dismissed as a "mere general concern." The controversy reflects upon the integrity of the administration and management of our universities as well as our entire system of collegiate athletics.

The issue is not the rather obtuse query of whether "in 1985 there was no legitimate controversy or debate about the desirability of NCAA rules violations," as the Kentucky Supreme Court and respondent state. (R. Br. 8, *quoting, Warford*, 789 S.W. 2d 758, 767 (Ky. 1990)). The controversy encompasses such issues as whether the NCAA recruiting rules make sense; whether they are being observed by the schools and their recruiters; whether they are being enforced by the NCAA; what consequences result from wholesale violation of, or adherence to, the rules; and what reforms may be needed to prevent the exploitation of minority student-athletes. Respondent's suggestion that this controversy is so much less precise than national controversies regarding "contemporary standards of nudity in print and film and sexual mores" or "the need to reform the structure and management of private oil industry" is completely unpersuasive. (R. Br. 8; *citing, Tavoulareas v. Piro*, 817 F.2d 762 (D.C. Cir.) (*en banc*), cert. denied, 484 U.S. 870 (1987); *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123 (2d Cir. 1984).

Respondent charges that the Petition has mischaracterized the opinion of the Supreme Court of Kentucky by

stating that the decision requires a pre-existing local controversy. But that is precisely what the opinion does. The Kentucky Supreme Court began by asserting that

The "nationwide controversy regarding recruitment of college athletes" is too general a statement of a public controversy to be the axis of debate.

(App. 21). The court then proceeded to review the evidence with respect to the type of controversy it considered necessary, to wit: a pre-existing controversy over recruiting at Pittsburgh, and concluded there was no such controversy. In fact, the opinion held that even if there were a general national recruiting controversy, there must also be a local one at Pittsburgh:

At Pittsburgh, there was no particular or ongoing controversy with which to link the general recruitment issue or controversy; thus, we cannot conclude that appellant was involved in a particular and identifiable public controversy.

(App. 25).

It is respondent who has mischaracterized the opinion below, and for good reason. The upshot of the Kentucky Supreme Court's decision is that as a controversy is more important, complex, and national in scope and scale, the less likely it is that expression concerning the controversy will be protected. This cannot be the law.

5. Reply To Argument Denying Respondent's Involvement In Any Public Controversy

Respondent's final point is that his involvement in any controversy was too minute to render him a public

figure. (R. Br. 9-11). Again, respondent mistakenly accuses the Petition of mischaracterizing the opinion below, stating that the court did nothing more than conclude the respondent "had not assumed the risk of public scrutiny." (R. Br. 9). But it is undisputed that Warford attempted to recruit the most publicized high school basketball player in Kentucky, for a highly publicized basketball program in what was one of the most highly publicized basketball conferences in America. And he did this to attract public notice of his school's program and his own recruiting skills. He sought this attention to obtain a head coaching position for himself. It cannot fairly be said he was not assuming the risk of public scrutiny. Indeed, respondent himself has admitted he did:

As a public figure I understand the consequences of being in the public eye. I also know that by being in this profession, there are pitfalls and we, as coaches, are in the proverbial fishbowl. . . .

(R.O.A. Vol. 3 at 453).

Respondent's true argument is that his actions do not meet a surrogate standard for assumption of risk that he would impose upon this Court's "public figure" precedent. His argument is that he must have attempted to "resolve" a particular public controversy before he may be deemed a "public figure." He further argues that the controversy over NCAA regulation of the treatment and recruiting of college athletes is too great a controversy, and his role too small, for him to be deemed a "public figure."

This argument is wholly misconceived. First, it suggests that as a controversy becomes more fundamental,

more apparently intractable, and less capable of resolution by any one person, speech concerning that controversy and the actors in it should be afforded less protection by the First Amendment than is speech about small parochial controversies. But it is speech concerning just such intractable national controversies that the rule of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), is most intended to protect. Again, respondent's position cannot be the law.

Second, the argument entails that only a plaintiff's efforts to resolve a controversy will constitute activity which may be the predicate for speech protected by the *Sullivan* rule. However, many important participants in a public controversy are neither interested in resolving it, nor acting to do so. Some, like Warford, may actually worsen the chances for resolution. Nevertheless, speech about such figures is as important, if not more so, than speech about persons attempting a resolution. Participants, like the respondent, who willingly enter a public controversy motivated by self interest have assumed the risk of public scrutiny as clearly as those who are participating for the purpose of resolving it.

The teaching of respondent's case law is contrary to his position here and congruent to the argument presented by petitioners. None of the plaintiffs held to be "public figures" in the three cases cited resolved the controversy in which he was involved, nor was any of them able to, or interested in, trying to resolve it. *Clyburn v. News World Communications, Inc.*, 903 F.2d 29 (D.C. Cir. 1990); *Trotter v. Jack Anderson Enters., Inc.*, 818 F.2d 431 (5th Cir. 1987); *McDowell v. Paiewonsky*, 769 F.2d 942 (3d Cir. 1985).

The opinion of the Kentucky Supreme Court presents two disturbing paradoxes: the greater the public controversy, the less the protection afforded to speech concerning it; the more dysfunctional and self-serving a participant's role in a controversy, the more likely that criticism of his actions will be unprotected. Because these paradoxes are contrary to this Court's constitutional libel jurisprudence, and greatly "chill" and restrict our "robust, and wide-open" discussion of national public controversies, review of the opinion below should be granted.

Respectfully submitted,

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COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 89-SC-181-T

REGGIE WARFORD APPELLANT
VS. APPEAL FROM FAYETTE CIRCUIT COURT
86-CI-4251

THE LEXINGTON HERALD-LEADER
COMPANY; and, JOHN S. CARROLL,
INDIVIDUALLY APPELLEES

JOINT MOTION TO SUPPLEMENT
RECORD ON APPEAL

* * *

Come the parties, by counsel, and jointly move the Court to enter an Order permitting the record on appeal to be supplemented with a partial, unofficial transcript of the proceedings before the Fayette Circuit Court.

The transcript was produced by court reporter Betty Hatfield who was retained by Appellees to attend and transcribe the trial. It consists of the testimony of all the witnesses who actually appeared at trial and includes the majority of trial evidence relating to the issues on appeal. The transcript does not include bench conferences or those conferences held in Chambers. Neither does it include deposition testimony or court rulings.

The parties state that supplementation of the record on appeal with this transcript will benefit the Court and the parties by providing them the option of working with and citing to the transcript whenever possible, rather than having to exclusively use the video record. Since the transcript will be supplemental to the video record, the

Supp. App. 2

video will still be available to the parties and the Court for use in matters not included in the transcript. This appeal can be advanced more efficiently and economically through the use of the transcript and, therefore, the parties urge the Court to permit the record on appeal to be supplemented as requested.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing has been served by hand delivering a copy of same to Honorable James E. Keller, Judge, Fayette Circuit Court, Fayette County Courthouse, Lexington, Kentucky; this the 15th day of May, 1989.

/s/ Elizabeth S. Feamster

COUNSEL FOR APPELLANT

/s/ James L. Thomerson

COUNSEL FOR APPELLEE

ref:gen/gr

Warford V. HL

SUPREME COURT OF KENTUCKY

89-SC-181-TG

REGGIE WARFORD

APPELLANT

V. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES E. KELLER, JUDGE
86-CI-004251

LEXINGTON HERALD-LEADER COMPANY, ET AL.
APPELLEE

ORDER

The parties' joint motion for an extension of time in which to file their briefs in the above-styled action is granted. Appellant shall file his brief within sixty (60) days of the date of the entry of this order. Appellees' shall file their brief within sixty (60) days of the date of the filing of appellant's brief.

The parties' joint motion to supplement the record on appeal with a partial, unofficial transcript of the proceedings before the Fayette Circuit Court in the above-styled action is denied.

Vance, Wintersheimer, Combs and Gant, JJ., sitting.
All concur.

ENTERED May 31, 1989.

/s/ Robert F. Stephens
Chief Justice

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 89-SC-181-TG

REGGIE WARFORD APPELLANT
APPEAL FROM FAYETTE CIRCUIT COURT
VS. NO. 86-CI-4251

THE LEXINGTON HERALD-LEADER COMPANY;
and JOHN S. CARROLL, Individually APPELLEES

APPELLEES' PETITION FOR REHEARING

* * *

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This is to certify that a true and correct copy of the within Appellees' Petition for Rehearing has been served on Hon. James E. Keller, Judge, Fayette Circuit Court, Fayette County Courthouse, Lexington, Kentucky 40507; Elizabeth S. Feamster and Barry M. Miller, Fowler, Measle & Bell, 4th Floor, Bank One Plaza, Lexington, Kentucky 40507-1680, Counsel for Appellant; Larry S. Roberts, 156 Market Street, Lexington, Kentucky 40507, Counsel for Appellant; by mailing same, postage prepaid, on this the 16th day of May, 1990.

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PURPOSE OF PETITION

Appellees seek rehearing under CR 76.32 because this Court misconceived the law applicable to the evidentiary issue involving Patti Eyster and Irvin Stewart. This Court ruled that the trial judge on remand should exclude clearly admissible evidence that Eyster and Stewart were used by Warford to assist him in making direct and indirect offers of money to Steve Miller. The evidence shows that Warford formulated and enacted a scheme to recruit Miller in violation of NCAA rules. The component elements of this scheme included (1) his use of Stewart to offer Miller money, cars and other improper inducements; (2) his use of Eyster in order to funnel money to Miller from Pitt boosters; and (3) his offer to split his raise with Miller. The recruitment was so dominated by these events that the discussion of splitting Warford's raise can only be placed in context with proof of the entire recruitment.

This Court did not fully consider the effect its advance ruling will have on the retrial of this case. Excluding the evidence concerning Eyster and Stewart will hamstring the jury in judging the credibility of Miller and Warford and in deciding the issue of truth. It is impossible for a jury to determine who is telling the truth without knowing all of the facts underlying the relationship between Warford and Miller. Furthermore, the witnesses who know anything about the recruitment, outside

of Miller and Warford, will be effectively precluded from testifying or being cross-examined. These would include Miller's mother, father, stepfather, high school coach, best friend, girlfriend, Roy Chipman, Jimmy Gay, Stewart and Eyster. While Warford claims Appellees should have talked to these people prior to publication, he now seeks to make their testimony unavailable to the jury. Exclusion of the evidence will eliminate the context surrounding Warford's statements, result in an artificial presentation of the case and cause the jury to be misled.

Four grounds support the admission of the evidence relating to Eyster and Stewart. First, this evidence is clearly beyond the scope of the "other bad acts" rule because it is a part of Warford's overall recruitment of Steve Miller and is inextricably intertwined with evidence of his offer of money to Miller.¹ Second, even if this evidence involves "other bad acts," it satisfies established exceptions to the rule. It is clearly relevant to the issues of (1) Warford's intention, (2) Miller's lack of mistake in construing Warford's statements, and (3) Warford's plan to recruit Miller with offers of money. Third, admission of this testimony is not unfairly prejudicial. Fourth, excluding the evidence has the effect of impermissibly restricting Appellees' ability to prove truth.

Additionally, this Court should not now rule that the evidence is improper under any circumstances. On

¹ The Court acknowledged "Appellees counter that the other acts were 'inextricably tied' to the ultimate issue of truth" (Opinion of the Court by Justice Lambert [hereinafter referred to as "Opinion"] at 39), but went no further in its analysis.

remand, Plaintiff may "open the door" or other issues may arise. This Court should give guidance to the trial court rather than make an advance ruling without a record of the retrial before it.

Finally, the Court's present Opinion will alter prior, well settled Kentucky law on the above issues. The present ruling will dramatically change civil and criminal litigation in the areas of conspiracy, fraud and other "scheme oriented" cases.

ARGUMENT

A. The Evidence is Inextricably Intertwined With the Conduct in Question

The Court ruled this evidence should be excluded because it related to other bad acts that were extrinsic to Warford's offer of money. Yet, the evidence goes directly to the truth of whether Warford offered Miller money. It shows that Warford's scheme to recruit Miller included the use of recruiting aides to assist him in making various improper money offers to Miller. Recruiting aides were a crucial part of Warford's overall plan to recruit Miller, as were suggestions of "splitting raises." Where evidence of an act is inextricably intertwined with the conduct which is the subject of the litigation, that act is not extrinsic evidence and the "other acts" rule "is not implicated." *United States v. Holmes*, 822 F.2d 802, 805 (8th Cir. 1987); *United States v. DeLuna*, 763 F.2d 897, 913 (8th Cir.), cert. denied, 474 U.S. 980 (1985).

There is nothing "extrinsic" about the evidence of Warford's use of Eyster and Stewart:

An act cannot be characterized as an extrinsic act when the evidence concerning that act and the evidence used to prove the [conduct which is the subject of the litigation] are inextricably intertwined. (citations omitted).

United States v. Aleman, 592 F.2d 881, 885 (5th Cir. 1979).² To decide whether the evidence is extrinsic or inextricably intertwined with the conduct in question, the Court must determine whether the testimony concerning such evidence "would have been incomplete and confusing" without it. *United States v. Aleman*, 592 F.2d at 885. To understand and evaluate the discussion of "splitting a raise," the jury must hear about the entire recruitment to decide if Warford in fact was offering Miller money as Appellees reported.

Warford admits that the subject of a raise came up with Miller, but contends that Miller misinterpreted his statements as an offer of money. The jury can understand why Miller construed the statements as he did only if it knows everything he knew at the time. Exclusion of the evidence of recruiting aides will certainly "create a gap in the jury's understanding" of the matter in dispute. *United States v. Holmes*, 822 F.2d at 806. This "gap" is widened because the Court's ruling in effect precludes almost

² It is significant to note that most authorities are criminal cases. Even though the courts are extremely sensitive to the need to protect the rights of a defendant in a criminal trial, they nonetheless have found such evidence to be admissible. If it is admissible in the criminal context, it certainly should be admissible in the civil context, where the potential consequences are greatly reduced.

everyone who knows anything about the recruitment from testifying.

Evidence of Warford's use of recruiting aides and his offers of money made through them is "so blended or connected" with his offer to split his raise with Miller that it "explains the circumstances" of such offer. Cf. *United States v. Bass*, 794 F.2d 1305, 1312 (8th Cir.), cert. denied, 479 U.S. 869 (1986); *United States v. Two Eagle*, 633 F.2d 93, 96 (8th Cir. 1970). This evidence is necessary to "give the jury a total picture" of Warford's recruiting of Miller, Cf. *United States v. Ball*, 868 F.2d 984, 988 (8th Cir. 1989), and to "complete the story." *United States v. Robinson*, 782 F.2d 128, 130 (8th Cir. 1986).³

This Court has similarly recognized the necessity for evidence of events which are inextricably intertwined with the event in dispute and has held such evidence to be admissible. See *Fleming v. Commonwealth*, 284 Ky. 209, 144 S.W.2d 220, 221 (1940) (evidence of other acts which are "so interwoven with the one being tried that they cannot well be segregated" is admissible); *Ware v. Commonwealth*, Ky., 537 S.W.2d 174, 179 (1976) ("evidence that provides the necessary perspective" is admissible); *Caldwell v. Commonwealth*, Ky., 503 S.W.2d 485, 489 (1972) (evidence of act is admissible "if so interwoven as to make it necessary and appropriate to mention."); and R. Lawson, *Kentucky Evidence Law Handbook* (2d ed. 1984) § 2.20(B) at 36.

³ See also *United States v. Williford*, 764 F.2d 1493 (11th Cir. 1985); *United States v. Costa*, 691 F.2d 1358 (11th Cir. 1982); *United States v. Derring*, 592 F.2d 1003 (8th Cir. 1979) and *United States v. Robbins*, 613 F.2d 688 (8th Cir. 1976).

The trial court stated that it did not view the Eyster/Stewart evidence to be "other acts." (See Appellees' Brief at 48 n.18) The trial court clearly did not abuse its discretion in viewing the evidence in this manner. *See e.g., U.S. v. DeLuna*, 763 F.2d at 912-16. This Court failed to review the evidence in its appropriate context and did not consider whether the testimony concerning the use of Eyster and Stewart was so interwoven with Warford's offer to money to Miller as to take it outside the scope of the "other acts" rule. Additionally, this Court failed to accord proper deference to the trial court's ruling. Appellees respectfully urge, therefore, that rehearing be granted.

B. Even if the Evidence is Deemed to be "Other Acts", it is Admissible to Prove Intent, Lack of Mistake, and Plan

In applying the other bad acts rule to exclude the evidence at issue, this Court failed to consider pertinent exceptions to the rule.⁴ The evidence is admissible to prove intent, lack of mistake, and plan, all of which are recognized exceptions to the other bad acts rule.

The evidence at issue goes directly to Warford's intent and, correspondingly, Miller's lack of mistake in

⁴ The Court seemed to place undue significance on the issue of motive. It was not Appellees' intent to introduce this testimony as proof of motive, nor was the evidence to be used to establish Warford's character or his general recruiting practices. While the decision in *Holdaway Drugs, Inc. v. Braden*, Ky., 582 S.W.2d 646 (1979), which turned on the issue of motive, was cited in Appellees' brief, it was only to demonstrate that Kentucky has adopted a rule of evidence paralleling Fed. R. Evid. 404(b).

concluding that Warford's statement was an offer of money. Kentucky courts have held that similar acts or representations made at about the same time as the one in question are relevant to establish intent. *National Council of the Knights and Ladies of Security v. Rowell*, 276 Ky. 335, 123 S.W.2d 1041, 1044 (1939). See also, R. Lawson, *Kentucky Evidence Law Handbook* (2d ed. 1984) §2.20(C) at 26. Intent is particularly significant in this case, since Warford admits his raise was mentioned, but denies it was an offer of money. He contended that Miller misunderstood his statements or made a mistake. Appellees are entitled to prove that Warford's intent in making these statements was to offer money, just as that was his intent in the offers involving his recruiting aides, Eyster and Stewart.

Warford had a well-defined scheme to recruit Miller through offers of money. The testimony concerning the use of Stewart and Eyster as recruiting aides "formed an integral and material part" of the circumstances surrounding the offer to Miller. It proves the plan and is, therefore, admissible. Cf. *United States v. Aleman*, 592 F.2d 881, 886 (5th Cir. 1979).

The Kentucky courts have held that other acts are admissible "to explain or show the purpose and character of the particular transaction under scrutiny." *Tyler-Couch Construction Co. v. Elmore*, Ky., 264 S.W.2d 56, 58 (1954) (evidence admitted because it showed a "continuing course of conduct"). See also *Cook's Adm'r v. Bank Josephine*, 301 Ky. 193, 191 S.W.2d 209, 211 (1948); and R. Lawson, *Kentucky Evidence Law Handbook* (2d ed. 1984) §2.29(C) at 26. Evidence of Warford's use of Eyster and Stewart in making direct and indirect offers of money to

Miller should be ruled admissible here for the same reason.

C. The Evidence is Not Unfairly Prejudicial

The trial court held that the Eyster and Stewart evidence was relevant and admissible to place the communications between Warford and Miller in context. This Court ruled that the probative value of such evidence on the issue of Miller's belief "was far outweighed by its potential for prejudice." (Opinion at 42) In doing so, the Court did not articulate any specific *unfair* prejudice to Warford or reconcile its ruling with the applicable abuse of discretion standard of review.

Kentucky's rule parallels Federal Rule of Evidence 403 which provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *See R. Lawson, Kentucky Evidence Law Handbook* (2d ed. 1984) §2.00 at 20. The main distinction between the state and federal rules is that, as stated in Professor Lawson's Handbook, the Kentucky rule clearly places such evidentiary rulings within the discretion of the trial court. *See Transit Authority of River City v. Vinson*, Ky. App., 703 S.W.2d 482, 487 (1985).

This Court should not overrule the trial court's discretion based on a mere *potential* for prejudice. The trial court concluded that the Eyster/Stewart evidence was sufficiently probative on the relevant issues and that it

should be admitted. That it damages Warford's position on the issues of intent, lack of mistake, and plan, is hardly sufficient to exclude it.

Case law demonstrates that evidence is "unfairly" prejudicial to the opposing party only if it injects into the case something which has "an undue tendency to suggest a decision on an *improper* basis, commonly, though not necessarily, an *emotional* one." Advisory Committee Notes to Fed. R. Evid. 403 (Emphasis added). This was recognized in *Transit Authority of River City v. Vinson*, Ky. App., 703 S.W.2d 482 (1985), where the court addressed the admissibility of a private investigator's report and photographs of the plaintiff. The court, noting that there was nothing "offensive" about the reports or photographs, ruled that the evidence was not unfairly prejudicial and was, therefore, admissible. *Id.* at 487.⁵

⁵ Federal court decisions similarly have recognized the inclusionary nature of the rule. See *Gross v. Black & Decker (U.S.), Inc.*, 695 F.2d 858, 863 (5th Cir. 1983) ("[B]y restricting the rule to evidence which will cause 'unfair prejudice' the draftsmen meant to caution courts that mere prejudicial effect is not sufficient reason to refuse admission. Probative evidence will frequently be prejudicial to a party, but that does not mean that it will cause the fact finder to ground a decision on an emotional basis."); *Koloda v. General Motors Parts Div., Gen. Motors Corp.*, 716 F.2d 373, 377-378 (6th Cir. 1983) ("In reviewing a decision of a trial court on this issue we must look at the evidence in a light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effects . . . Unfair prejudice . . . is not to be equated with testimony simply adverse to the opposing party. Virtually all evidence is prejudicial or it isn't material. The prejudice must be 'unfair'."); *Hines v. Joy Manufacturing Co.*, 850 F.2d 1146, 1154

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The relevance of the Eyster/Stewart evidence is not outweighed by any unfair prejudice. It does not inject anything emotional or inflammatory into the case, but merely discredits Warford's arguments. He contends that Miller's recruitment was uneventful and that any discussion of a raise was an innocent act in an innocent relationship. Evidence which directly contradicts the main thrust of Warford's testimony should not be excluded as more unfairly prejudicial than relevant. The trial court's ruling should be affirmed and the evidence should be admitted in the retrial of this case. At a minimum, this Court should rule that admission of the evidence remains a matter within the trial court's discretion.

D. The Ruling Impermissibly Burdens The Presentation Of Evidence On the Issue Of Truth

The Court in *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986) held, as a matter of First Amendment law, that "the common law's rule on falsity – that the defendant must bear the burden of proving truth – must

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(6th Cir. 1988) ("The district courts have broad discretion in deciding issues of admissibility under Rule 403. . . . In order to exclude evidence under Rule 403, it must be more than damaging to the adverse party; it must be unfairly prejudicial."); *United States v. Hewes*, 729 F.2d 1302, 1315 (11th Cir. 1984), cert. denied, 469 U.S. 1110 (1985) ("[T]he extrinsic offenses were not of such a heinous nature that they were likely to incite the jury to an irrational decision. . . . Such irrationality is the primary target of Rule 403, and the possibility of prejudice we therefore consider slight."); *United States v. Schrock*, 855 F.2d 327, 333 (6th Cir. 1988); *Ramos v. Liberty Mutual Ins. Co.*, 615 F.2d 334, 340 (5th Cir. 1980); *Rhodes v. Michelin Tire Corp.*, 542 F.Supp. 60, 62-63 (E.D. Ky. 1982).

similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages." *Id.* at 776. It is Warford's burden to prove that the statements made about him were false. The effect of this Court's ruling precluding the admission of evidence of the use of recruiting aides is to deprive the newspaper of the opportunity to present contrary evidence on the issue of the statement's alleged falsity. Such an effect is constitutionally impermissible.

CONCLUSION

Appellees respectfully request that this Court grant this Petition for Rehearing and reconsider its ruling that the evidence relating to Eyster and Stewart is inadmissible.

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